

United States Senate

WASHINGTON, DC 20510

October 9, 2023

Dr. Miguel Cardona
Secretary of Education
400 Maryland Avenue, SW
Washington, DC 20202

Dear Secretary Cardona,

Before you begin a precedent-setting negotiated rulemaking to end-run the Constitution to provide President Biden's promise of broad student loan forgiveness, we ask you to dispense with this partisan policymaking charade. Instead, join us in pursuing legal legislative solutions for federal student loans.

On October 10 and 11, 2023, the Department of Education (the Department) plans to begin negotiations on a student loan cancellation rule. This rulemaking effort is based on an announcement from June 30, 2023, the same day the Supreme Court struck down as unconstitutional the Department's first effort to cancel student debt.¹ You stood beside the President that day as he formally announced his intention to circumvent the Supreme Court through this negotiated rulemaking process.²

A Department fact sheet released on June 30, 2023 stated: "The Secretary of Education initiated a rulemaking process aimed at opening an alternative path to debt relief for as many working and middle-class borrowers as possible, as fast as possible..."³ This rulemaking process attempts to regulate language unchanged since 1965 within Section 432(a) of the Higher Education Act (HEA) of 1965, which authorizes the Secretary to "compromise, waive, or release any right, title, claim, lien, or demand" within the Federal Family Education Loan (FFEL) program.⁴ In fact, language in Section 432(a) predates the HEA and the Department as part of the National Defense Education Act of 1958.⁵

¹ *Biden v. Nebraska*, 143 S. Ct. 2355 (2023) (Concluding that "The HEROES Act allows the Secretary to "waive or modify" existing statutory or regulatory provisions applicable to financial assistance programs under the Education Act, but does not allow the Secretary to rewrite that statute to the extent of canceling \$430 billion of student loan principal.")

² Remarks by President Biden on the Supreme Court's Decision on the Administration's Student Debt Relief Program (June 30, 2023), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/06/30/remarks-by-president-biden-on-the-supreme-courts-decision-on-the-administrations-student-debt-relief-program/>; 88 Fed. Reg. 43,069 (July 6, 2023).

³ FACT SHEET: President Biden Announces New Actions to Provide Debt Relief and Support for Student Loan Borrowers (June 30, 2023), <https://www.ed.gov/news/press-releases/fact-sheet-president-biden-announces-new-actions-provide-debt-relief-and-support-student-loan-borrowers>

⁴ 20 USC 1082(a); (Section 432(a) is written into the FFEL program. Yet the language to be regulated is not clearly a term or condition of the FFEL loan program. In fact, the Direct Loan program only clearly specifies that the terms, conditions, benefits, and amounts of FFEL loans under sections 428, 428B, 428C, 428H, apply through Section 455(a)(1) of the HEA. This leaves the application of Section 432(a) of the FFEL Program to the Direct Loan program unclear. (20 USC 1078, 1078-2, 1078-3, and 1078-8; 20 USC 1087e; 20 USC 1082(a)))

⁵ P.L. 85-864

Your blatant attempt to subvert the Constitution via a regulatory process not only makes a mockery of negotiated rulemaking under the HEA, but also of the separation of powers. Article I Section I of the Constitution states, “All legislative powers herein granted shall be vested in a Congress of the United States.” Congress has not passed any legislation giving the Secretary, or anyone in the Executive branch, the authority for mass cancellation of student loans.

The lack of authority is further evident by the fact that there is no precedent for providing mass student loan discharges under the current administration through section 432(a) to groups of student borrowers **without** a link to an otherwise outlined statutory discharge authority.⁶ Any time Congress has intended to provide the Department with group discharge authority, it has expressly done so. These instances include closed school discharge in Section 437(c) and Borrower Defense to Repayment in Section 455(h).⁷

The Department is not only clearly exceeding their statutory authority, but such a blatantly biased panel of negotiators shows that this process is simply a means to an end. Negotiated rulemaking is meant to balance the concerns of disparate groups as they attempt to reach an agreement on regulatory provisions regarding Federal Student Aid. However, the panel of 14 negotiators selected by the Department consists overwhelmingly of borrowers and representatives of institutions of higher education who directly stand to gain from enabling wide parameters for forgiveness on student loans and conveniently provide you with a fig leaf of political cover for your pre-stated goal of this rulemaking.

Your choice to conveniently exclude the interests of taxpayers who paid their loans, did not take student loans, or did not attend college removes any pretenses of fairness from this panel. The 87 percent of Americans with no student loan debt have no input, instead they are left with the \$400 billion projected price tag of the program—or over four times the Department of Education's fiscal year 2023 budget.⁸

Josh Divine, Solicitor General of the State of Missouri, Marc Goldwein, Senior Vice President and Senior Policy Director for the Committee for a Responsible Federal Budget, and Michael Mohr-Ramirez, Government Affairs Manager of Taxpayers Protection Alliance, were each nominated but turned away from effectively having their voices at the negotiation.⁹ In their place, the Department chose negotiators who have been very clear that they already agree with the administration's stance. Rather than choose those skeptical about student debt cancellation, the Department selected negotiators who have expressed their disappointment that President Biden “might cancel *just* \$10,000” and have proposed increasing subsidies for student loans.¹⁰

⁶ Sweet v. Cardona (N.D. Cal.), No. 3:19-cv-03674-WHA, Joint Response to November 4, 2022 Order (Nov. 9, 2022), p. 2;

⁷ 20 USC 1087(c); 1087e(h)

⁸ *Fiscal Year 2023 Budget Summary*, U.S. DEPARTMENT OF EDUCATION, (accessed Oct. 4, 2023), <https://www2.ed.gov/about/overview/budget/budget23/summary/23summary.pdf>; Letter from Congressional Budget Office to Senator Burr and Congresswoman Foxx, *Costs of Suspending Student Loan Payments and Canceling Debt*, (Sept. 26, 2022), <https://www.cbo.gov/system/files/2022-09/58494-Student-Loans.pdf>.

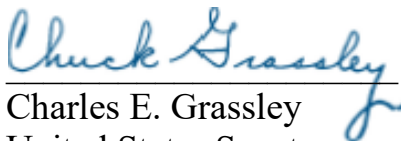
⁹ *2023 Negotiated Rulemaking Student Loan Debt Relief Committee*, UNITED STATES DEP'T OF EDUCATION OFFICE OF POSTSECONDARY EDUCATION, (accessed Oct. 4, 2023), <https://www2.ed.gov/policy/highered/reg/hearulemaking/2023/student-loan-debt-relief-committee-list.pdf>.


¹⁰ Derrick Johnson & Wisdom Cole, *Opinion: NAACP CEO: Biden's Reported Plan to Cancel Student Debt Isn't Enough*, CNN BUSINESS, (Aug. 24, 2022), <https://www.cnn.com/2022/08/24/perspectives/student-loan-debt-biden->

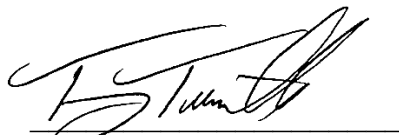
We are gravely concerned that the Department is undertaking a blatant political process with a predetermined outcome to achieve one of the President's campaign promises at all costs. We urge you again to abandon this mockery of a rulemaking process. It is unfair to string student loan borrowers along for political purposes in a process that is undoubtedly deficient to stand up in a court of law.

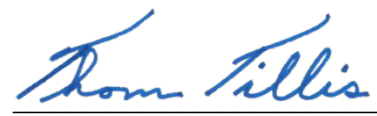
We invite you and the President to pursue legal reforms through the legislative process. We have already introduced the Lowering Education Costs and Debt Act to serve as an offer on the table.¹¹ Our phones are ready and our doors are open.


Sincerely,


Charles E. Grassley
United States Senator


John Cornyn
United States Senator


Tommy Tuberville
United States Senator


Thom Tillis
United States Senator


Tim Scott
United States Senator

naacp/index.html; *Oregon Agency Releases First Student Loan Report, Looking at Challenges, Confusion, Offering Solutions*, KTVZ NEWS SOURCE (Aug. 10, 2023), <https://ktvz.com/news/oregon-northwest/2023/08/10/oregon-agency-releases-first-student-loan-report-looking-at-challenges-confusion-offering-solutions/>.

¹¹ S.1972 – 118th Congress (2023-2024): Lowering Education Costs and Debt Act. (2023, June 14).